

EXHIBIT 39

1 Jayne W. Williams, Esq. (SBN:63203)
jwilliams@meyersnave.com
2 Deborah J. Fox, Esq. (SBN: 110929)
dfox@meyersnave.com
3 Philip A. Seymour (SBN: 116606)
pseymour@meyersnave.com
4 Kimberly M. Drake, Esq. (SBN: 209090)
kdrake@meyersnave.com
5 MEYERS, NAVE, RIBACK, SILVER & WILSON
6 555 12th Street, Suite 1500
Oakland, California 94607
7 Telephone: (510) 808-2000
Facsimile: (510) 444-1108
8 Attorneys for Defendant
9 CITY OF SAN LEANDRO

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 INTERNATIONAL CHURCH OF THE
14 FOURSQUARE GOSPEL,

15 Plaintiff,

16 v.

17 CITY OF SAN LEANDRO, a municipal
18 corporation,

19 Defendant.
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21

22 FAITH FELLOWSHIP FOURSQUARE
23 CHURCH,

24 Real Party in Interest.
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Case No. C07-03605-PJH

DEFENDANT CITY OF SAN
LEANDRO'S MOTION FOR
SUMMARY JUDGMENT OR IN
THE ALTERNATIVE SUMMARY
ADJUDICATION OF CLAIMS

Hearing:

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Honorable Phyllis J. Hamilton
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1 I. *INTRODUCTION AND BACKGROUND FACTS*

2 The Faith Fellowship Church is the local affiliate of the International Church of the
3 Foursquare Gospel (collectively "the Church"). The Church has been extraordinarily
4 successful growing from a congregation of 65 in 1993 to an estimated total of 1300-1550
5 in 2008 with allegedly as many as 1700 attendees at the Church's current location at 577
6 Manor Boulevard on a single day. First Amended Complaint ("FAC"), ¶ 12; Mortara
7 Depo., Exhibit 30, p. 534, ln. 24 to p. 535, ln 1; p. 536, lns. 15-16. The Church has also
8 undertaken to provide numerous charitable, social and educational services at its current
9 facilities, including youth ministries, feeding the disadvantaged, weight management
10 classes and other programs. FAC ¶¶ 59, 68, 69. According to the Church, the 577 Manor
11 Boulevard property is hampered by lack of adequate parking and the need to juggle the
12 scheduling of its support facilities on its existing church campus. The Church believes all
13 these problems would be resolved, however, were it allowed to relocate its church
14 operations to an larger property with existing buildings consisting of 3 adjoining parcels at
15 14600-14850 Catalina Street (the "Catalina Street Property") in a prime industrial zoned
16 area of San Leandro. Sims Depo., Exhibit 29, p. 526, lns. 19-25.

17 Several City representatives met with Church representatives in early 2006 to
18 discuss the Church's relocation plans. The Church was advised that the Catalina Street
19 property was zoned "IP" (Industrial Park), and that assembly uses such as churches were
20 not allowed in that zone. To pursue relocation to that site, the Church would have to apply
21 for amendments to the Zoning Code text to allow churches with a conditional use permit;
22 City staff advised that the Church could also apply to change the zoning from IP to IL
23 (Industrial Limited) since this was a more appropriate zone. Declaration of Debbie Pollart,
24 ¶¶ 15-17. The Church filed its land use application on May 19, 2006 (Exhibit 26) some
25 sixty plus days after it had already entered into an escrow on the Catalina property.
26 Exhibits 36 and 37. City staff quickly recognized that the proposed amendments raised
27 City-wide policy considerations about locating assembly uses in industrial zones. This
28 precipitated a lengthy evaluation of potential options for expanding potential locations for

1 assembly uses, which were at that time only allowed in residential zones with a conditional
2 use permit. Pollart Decl., ¶¶ 18, 20-24. After obtaining policy direction at public meetings
3 of the Business Development Sub-Committee of the City Council and a joint meeting of
4 the City Planning Commission and Board of Zoning Adjustments, City staff proceeded to
5 prepare draft zoning amendments to create a new Assembly Use Overlay zone which
6 would allow assembly uses with a CUP on suitable properties in industrial and commercial
7 zones. Pollart Decl., ¶¶ 25-30. Ultimately some 196 properties, ranging in size from .12
8 to 27.15 acres in size were selected based on 8 objective criteria adopted from the City's
9 General Plan. The Assembly Use Overlay zoning amendments were presented to and
10 approved by the City Planning Commission (Exhibits 15, 16) and then by the City Council
11 on March 19, 2007. Pollart Decl., ¶¶ 31-35; Exhibits 17, 18.

12 Meanwhile, with no encouragement from the City, and against sound business
13 practices (Exhibit 34, p. 581), the Church proceeded to enter into a contract to purchase the
14 Catalina Street property. Pollart Decl., ¶¶ 15, 18. The sale was completed on December
15 29, 2006. FAC ¶¶ 16, 22, 30, 33. However, the Catalina Street property was not among
16 those selected for inclusion in the Assembly Use Overlay zone. On March 30, 2007 the
17 Church applied for a zoning amendment to include its property in the Assembly Use
18 Overlay zoning. City staff recommended against the amendment primarily based on the
19 site's inconsistency with 2 of the established 8 criteria that had been used to systematically
20 select properties for the recently completed comprehensive Assembly Use Overlay zone.
21 The Planning Commission voted to deny the application on April 12, 2007. Pollart Decl.,
22 ¶ 38; Exhibits 21, 22. The City Council denied the Church's appeal following a full public
23 hearing on May 7, 2007. Pollart Decl., ¶ 40; Exhibits 23, 24.

24 This action was commenced by the Church on July 12, 2007. This Honorable Court
25 denied the Church's application for a preliminary injunction on October 2, 2007.

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1 II. *THE CITY HAS NOT IMPOSED A "SUBSTANTIAL BURDEN" ON PLAINTIFF'S*
2 *EXERCISE OF RELIGION UNDER RLUIPA*

3 Plaintiff's First Cause of Action is brought under 42 U.S.C. § 2000cc(a)(1),
4 generally known as the "substantial burden" provision of RLUIPA. The Church alleges
5 that the City has imposed a "substantial burden" on it by, in a nutshell, denying the
6 rezoning requests that would have allowed the Church to relocate to a new larger site
7 where it believes its operation would not be hampered by parking overflow or scheduling
8 issues for its various ancillary outreach activities. The FAC also includes obligatory
9 allegations to the effect that the City's regulations are not supported by compelling
10 governmental interests, and that the City failed to select the least restrictive means for
11 achieving the City's interests, as well as allegations concerning the financial costs the
12 Church has endured in its efforts to secure City approval for new, larger facilities at
13 Catalina. FAC ¶¶ 71-81.

14 The Church's substantial burden claim fails for several reasons. First, the Church
15 cannot establish that the City's refusal to rezone a particular parcel of industrial land at the
16 Church's request amounts to a "substantial burden" on religion versus mere incidental
17 limitations. Second, even if the Church has been "substantially burdened," the City's
18 actions furthered a compelling public interest and adopted the least restrictive means.

19 A. *The City's Actions Did Not Impose a Substantial Burden on the Religious*
20 *Activities of the Church.*

21 1. *The "Substantial Burden" Test.*

22 It is generally agreed that the term "substantial burden" in RLUIPA is to be
23 construed in light of the term "substantial burden on religion" as employed in Supreme
24 Court and appellate court jurisprudence involving the Free Exercise clause of the First
25 Amendment. *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 988
26 (9th Cir. 2006); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 996-997 (7th Cir.
27 2006); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-761 (7th
28 Cir. 2003) ("C.L.U.B.").

1 Two interrelated elements must be considered in determining whether a particular
2 government action or regulation inflicts a “substantial burden” on religion. *See*
3 *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 348-350 (2nd Cir.
4 2007). The first issue is the *impact* on religious activity. The Ninth Circuit and other
5 circuits have made it clear that the impact must directly impinge upon the plaintiff’s ability
6 to practice religion, and must be truly substantial. “[F]or a land use regulation to impose a
7 ‘substantial burden,’ it must be ‘oppressive’ to a ‘significantly great extent.’ That is, a
8 ‘substantial burden’ on ‘religious exercise’ must impose a significantly great restriction or
9 onus upon such exercise.” *Guru Nanak*, 456 F.3d at 988, quoting *San Jose Christian*
10 *College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). A “substantial
11 burden” is thus one which “exert[s] substantial pressure on an adherent to modify his
12 behavior and to violate his beliefs.” *Id.*; *see also Midrash Sephardi, Inc. v. Town of*
13 *Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004) [“significant pressure which directly
14 coerces the religious adherent to conform his or her behavior accordingly.”]; *C.L.U.B.*, 342
15 F.3d 752, 761 [“a land use regulation which imposes a substantial burden on religious
16 exercise is one that necessarily bears direct, primary and fundamental responsibility for
17 rendering religious exercise ... effectively impractical.”].

18 The second issue that must be considered is the nature or context of the challenged
19 governmental actions. *Westchester*, 504 F.3d at 350; *see Lyng v. Northwest Indian*
20 *Cemetery Protective Ass’n*, 485 U.S. 439, 451, 108 S.Ct. 1319 (1988) [validity of action
21 cannot be determined from effect alone]. Governmental action that is specifically targeted
22 upon core religious activities will almost invariably be found to impose a substantial
23 burden, if for no other reason than such conduct is almost necessarily oppressive and places
24 an “onus” on religion. *See, e.g. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,
25 508 U.S. 520, 532, 113 S.Ct. 2217 (1993). Actions that are purely arbitrary or fail to serve
26 any valid purpose are also suspect and likely to be found to impose a substantial burden.
27 *Westchester*, 504 F.3d at 350-351; *see, e.g., Sts. Constantine and Helen Greek Orthodox*
28 *Church v. City of New Berlin*, 396 F.3d 895, 900-901 (7th Cir. 2005).

1 At the other end of the spectrum are facially neutral regulations of general
2 applicability adopted for purposes unrelated to religion. *See Lukumi*, 508 U.S. at 531;
3 *Westchester*, 504 F.3d at 350-351. Burdens imposed on religious activities by this type of
4 regulation are considered *incidental* burdens which must be borne by religious
5 organizations on the same footing as non-religious parties, and not “substantial burdens on
6 religion” absent extraordinary facts. Zoning regulations, absent abuse or arbitrary
7 application, generally fall within the “generally applicable” category of regulation.
8 *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 275-76
9 (3rd Cir. 2007). “A law is one of neutrality and general applicability if it does not aim to
10 “infringe upon or restrict practices because of their religious motivation, and if it does not
11 “in a selective manner impose burdens only on conduct motivated by religious belief.”
12 *San Jose Christian College*, 360 F.3d at 1032, quoting *Lukumi*, 508 U.S. at 533, 543.
13 Because incidental burdens, no matter how significant, do not trigger strict scrutiny,
14 “courts confronting free exercise challenges to zoning restrictions rarely find the
15 substantial burden test satisfied *even when the resulting effect is to completely prohibit a*
16 *religious congregation from building a church on its own property.*” *Westchester*, 504
17 F.3d at 350, emphasis added; *see Lighthouse Institute for Evangelism*, 510 F.3d at 274-
18 275; *Messiah Baptist Church v. County of Jefferson, State of Colo.*, 859 F.2d 820, 824-825
19 (10th Cir. 1988).

20 2. *Churches, Like Other Uses, Are Not Entitled to Rezoning Upon*
21 *Demand Under RLUIPA.*

22 Applying the foregoing principles, the Ninth Circuit and other circuits have
23 squarely rejected the proposition that refusal to rezone a particular site for religious uses,
24 without considerably more, may constitute a substantial burden on religious exercise. In
25 simplest terms, RLUIPA does not exempt churches from the realities of the real estate
26 market or the necessity of making reasonable efforts to accommodate themselves to valid
27 zoning provisions before claiming they have been “substantially burdened” in violation of
28 RLUIPA.

1 The Ninth Circuit first addressed a “substantial burden” claim in *San Jose Christian*
2 *College*, 360 F.3d at 1033-1035. The plaintiff sued after the city denied an application to
3 rezone property for use as a religious college on procedural grounds. *Id.* at 1027-1028. The
4 Ninth Circuit affirmed a summary judgment in favor of the city, finding that denial of the
5 rezoning application did not impose a substantial burden. The Court went on to note that
6 even if the applicable ordinance may have rendered the plaintiff unable to provide worship
7 or education services at the proposed site, “there is no evidence in the record demonstrating
8 that College was precluded from using other sites within the city.” *Id.* at 1035.

9 In *C.L.U.B.*, 342 F.3d 752, the Seventh Circuit upheld summary judgment for the
10 city and rejected the RLUIPA and constitutional free exercise claims of five churches, each
11 of which had applied for and were denied “special use” permits. The Court noted that the
12 alleged “scarcity of affordable land” and costs of navigating the municipal permitting
13 requirements did not constitute a substantial burden on religion where viable sites
14 ultimately existed and, in that case, were ultimately located by the plaintiffs. The Court
15 noted that neither RLUIPA or the Free Exercise clause require cities to grant churches
16 preferential rights over other land uses, nor insulate churches from “the harsh reality” that
17 “the marketplace sometimes dictates that certain facilities are not available to those who
18 desire them.” *Id.* at 761-762.

19 In *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846 (7th Cir.
20 2007), the church contracted to purchase an industrially zoned property containing buildings
21 that it wanted to convert to a church and religious classrooms. However, churches were not
22 allowed in the zone. After the town planning commission responded negatively to the
23 church’s rezoning application, the church withdrew its application but then proceeded to
24 buy the property and use it for church purposes anyway. The village secured an injunction
25 against continued church use of the property. The 7th Circuit rejected the church’s
26 subsequent RLUIPA substantial burden claim, finding that a prohibition on churches in
27 industrial zones was neither unreasonable nor a substantial burden on religion. *Id.* at 850-
28 851. The Court noted “When there is plenty of land on which religious organizations can

1 build churches (or, as is common nowadays, convert to churches buildings previously
2 intended for some other use) in a community, the fact that they are *not permitted to build*
3 *everywhere* does not create a substantial burden.” *Id.* at 851; emphasis added.

4 In *Grace United Methodist Church v. City Of Cheyenne*, 451 F.3d 643, 654-655
5 (10th Cir. 2006) the court rejected a Free Exercise claim that denial of a permit for a
6 religious day care center imposed a substantial burden on the plaintiff, noting that the
7 plaintiff could apply to locate the facility at a site properly zoned for it, or simply operate
8 its existing religious facilities on a “less grandiose” scale. And, in *The Lighthouse Institute*
9 *for Evangelism, Inc. v. The City of Long Branch*, 406 F.Supp.2d 507, 515-516 (D.N.J.
10 2005) the Court found that adoption of a redevelopment plan and rezoning that required
11 the plaintiff to relocate their existing church did not impose a substantial burden on the
12 plaintiff where there was evidence that alternate locations were available in the city.

13 Similarly, in *Episcopal Student Foundation v. City of Ann Arbor*, 341 F.Supp.2d
14 691, 705 (E.D. Mich. 2004), the Court found that the plaintiff could not claim a substantial
15 burden in the absence of evidence that it was impractical to lease or sublease alternate
16 facilities that would allow it to conduct some or all of its religious activities elsewhere.

17 3. *The City’s Decision Not to Rezone the Catalina Street Property Does*
18 *Not Amount to a Substantial Burden on the Exercise of Religion.*

19 Under the foregoing standard, the Church clearly cannot establish that it has been
20 “substantially burdened” by the City’s actions challenged here. While religious assemblies
21 are not allowed on the Church’s Catalina Street property, any burden this imposes on the
22 Church is clearly an incidental result of the City’s larger zoning provisions and plaintiff’s
23 core religious activities are not burdened. There is no evidence of intentional
24 discrimination or arbitrary conduct toward the Church. *See Westchester*, 504 F.3d at 350-
25 351; *Sts. Constantine and Helen Greek Orthodox Church*, 396 F.3d at 900-901. Instead,
26 the record shows a good faith effort by the City to *expand* opportunities for religious
27 assembly uses in the wake of the Church’s initial application. Pollart Decl., ¶ 20; Exhibits
28 11-20, inclusive. The fact that the Church’s property ultimately was not included in this

1 expansion based on objective and reasonable planning criteria does not entitle the Church
2 to relief under RLUIPA. Pollart Decl., ¶ 36.

3 There can also be little dispute that the City's zoning provisions as a whole provide
4 adequate sites for religious assemblies. Churches (and other Assembly Uses) have been
5 allowed with a CUP in *all* City residential zones for many years. Pollart Decl., ¶ 7; *see*
6 Zoning Code, Article 5, §§ 2-504.B.2, 2-506.B.2, 2-508.B.2, 2-510.B.2; City's RFJN,
7 Exhibit 3, pp. 013-016, 018. These zones comprise approximately 52% of the City.
8 Pollart Decl., ¶ 8. The enactment of the Assembly Use Overlay zoning amendments in
9 early 2007 added an *additional* 196 properties of various sizes located in both industrial
10 and commercial zones. Pollart Decl., ¶ 35; Exhibit 20. These numbers are not
11 disproportionate to the actual demand for church space in the City. There are currently a
12 total of 45 churches in the City. Pollart Decl., ¶ 5. Only two applications for new church
13 facilities were received by the City in the last five years. *Id.*, ¶ 13. According to the
14 Church's own pastor, no new churches were built in the City in the 17 years preceding
15 these applications. Exhibit 30, Mortara Depo., p. 537, Ins. 1-3.

16 The Church has previously offered a number of arguments as to why the City's
17 actions should still be deemed to impose a substantial burden. None have merit.

18 First and foremost, the Church apparently contends that there are no available sites
19 other than its Catalina Street property that are large enough to accommodate the size of
20 congregation and the range of additional social, charitable and educational activities it
21 claims are also important to its exercise of religion. The evidence, however, does not
22 support a conclusion that no other similarly sized sites are available. There are, to begin
23 with, approximately 78 sites over 3.5 acres in the City's residential zones. Pollart Decl., ¶
24 8. Of the parcels subject to the Assembly Use Overlay, four are over 10 acres in size; eight
25 are over 5 acres in size; 24 are over 2 acres in size and the largest is 27.15 acres. Pollart
26 Decl., ¶ 10; Exhibit 9. Beyond this, the AU Overlay zone was deliberately applied only to
27 areas containing a minimum of 2 acres of contiguous land, precisely so that smaller parcels
28 ///

1 could be aggregated to allow larger assembly uses, as is the case with the 3 adjoining
2 parcels that comprise the Church's Catalina Street property. Pollart Decl., ¶ 10.

3 The second problem with the Church's argument is that the Church cannot show
4 that its various religious activities must occur at a single location. While the Church may
5 *wish* to assemble its entire congregation in a single facility for worship services, it cannot
6 seriously argue that conducting services in two smaller locales, or conducting multiple
7 services *as it does now* would effectively prevent the Church's members from practicing
8 their religion. The Church's all-in-one-place argument is even weaker with respect to the
9 many other activities the Church wishes to include under its umbrella of operations. Many
10 counseling services include its weight-management classes and various educational
11 activities, clearly could be accomplished at other smaller locations, some of which may
12 require no discretionary City approvals at all, *e.g.* leased office space. *See Episcopal*
13 *Student Foundation*, 341 F.Supp.2d at 704-705. And, some activities such as the Church's
14 food programs, might well be conducted more effectively at a separate new location with
15 adequate kitchen, storage or other specialized facilities, and with greater accessibility to
16 their intended beneficiaries and less conflict with other Church activities and less impact to
17 affected neighbors. It is clear that the Church has adequate financial resources to lease or
18 acquire additional property for these purposes. In 2005, for example, it purchased a single
19 family residential parcel adjacent to its present facilities simply to acquire additional
20 parking spaces. Exhibit 30, Mortara Depo., p. 540, lns. 5-11, p. 541, lns. 20-23.

21 The Church cannot avoid these alternatives by insisting it must have a single large
22 property of its own choosing, no matter how sincere that belief may be. As noted
23 previously, burdens placed on religious exercise are deemed incidental burdens rather than
24 substantial burdens when they result from the neutral operation of a rational zoning
25 scheme. In allocating space among the various uses necessary to any functioning society,
26 municipalities also often face limited choices constrained by topography, past development
27 patterns, natural and political boundaries, environmental and transportation constraints, and
28 the planning rationale of maintaining reasonable separation between incompatible uses.

1 Having made reasonable efforts to accommodate religious uses – as the City clearly has – a
2 municipality cannot be faulted under RLUIPA for failing to anticipate or accommodate
3 demands by a religious organization for a particular property deemed specially suited to its
4 individual goals, ambitions or budget. This would not only exceed RLUIPA's goal of
5 securing equality – not special privileges – for religious assemblies, but also exceed
6 constitutional limits on preferences that may be given for religion. *Westchester Day*
7 *School v. Village of Mamaroneck*, 386 F.3d 183, 189-190 (2nd Cir. 2004). The fact that
8 the Church wishes to build an extraordinary size church and religious complex does not
9 obligate a moderate size and largely already-built-out city such as San Leandro to jettison
10 its adopted zoning plans to accommodate this demand.

11 It may be noted that the courts have extensively dealt with similar land use issues in
12 the context of the Free Speech clause. The rule that has developed there is that local
13 governments must zone a sufficient number of properties to accommodate the reasonably
14 anticipated demand for First Amendment uses. *City of Renton v. Playtime Theatres, Inc.*,
15 475 U.S. 41, 106 S.Ct. 925 (1986); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d
16 1524 (9th Cir. 1993). Municipalities are *not* required to guarantee that these properties
17 will actually be for sale, nor pre-equipped with buildings and improvements or visual
18 settings deemed desirable for First Amendment uses. *Id.* While the Church may bridle at
19 comparison with cases involving some less wholesome forms of First Amendment activity,
20 there is no reason to believe the same rules do not apply to all forms of free speech,
21 including those clearly on a parity with religious expression. Under these rules, were
22 Borders to sue the City simply because there were no commercially zoned parcels left in
23 the City that were large enough to accommodate its particular demands, the suit would
24 clearly fail. The result is the same here. The Church cannot unilaterally define its needs
25 and resulting alleged burdens on its practice of religion in a manner which trumps the
26 City's ability to make and adhere to otherwise reasonable zoning decisions.

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1 4. *The City's Actions Have Not Imposed a Substantial Financial Burden*
2 *on The Church.*

3 The Church also complains that costs associated with purchasing and holding the
4 Catalina Street property have imposed a substantial burden. FAC ¶ 84. The costs of
5 acquiring real estate and of pursuing necessary government approvals are, of course,
6 inherent costs incidental to any acquisition and development or reuse of property, and not
7 normally cognizable as a burden on religion. *San Jose Christian College*, 360 F.3d at 1035
8 ["the costs, procedural requirements, and inherent political aspects of the permit approval
9 process were 'incidental to any high-density urban land use' and thus '[did] not amount to
10 a substantial burden on religious exercise.'"]; *C.L.U.B.*, 342 F.3d at 760-761. While the
11 Church rather unwisely paid non-refundable deposits and then purchased the Catalina
12 Street property before any zoning approvals were obtained, it did not do so on the advice
13 of the City, or even in the best judgment of its own advisors. Pollart Decl., ¶¶ 15, 18;
14 Exhibit 36. The Church's financial burden is one entirely of the Church's own choosing,
15 not a burden imposed by the City. *See Petra Presbyterian*, 489 F.3d at 851 [no substantial
16 burden where church purchased property knowing it was subject to restrictions].

17 Of note, the original offer made by the Church was specifically conditioned "upon
18 Buyer in its sole judgment determining that the subject real property is suitable for *and*
19 *approved for use as a church*. This condition shall remain in full force and effect until
20 removed in writing by Buyer." Exhibit 36; Commercial Property Purchase Agreement and
21 Joint Escrow Instructions of March 24, 2006, p. 634; emphasis added. Just 4 days later
22 this contingency was deleted by the Church (Exhibit 37, p. 648) and the Church now tries
23 to shoulder the City with the effects of its poor business planning.

24 B. *The City's Actions Served a Compelling Governmental Interest and Were*
25 *The Least Restrictive Means of Protecting That Interest.*

26 Even assuming the Church has shown a substantial burden, the City's actions are
27 lawful under RLUIPA if supported by a compelling governmental interest and is the "least
28 restrictive" means of furthering that interest. 42 U.S.C. § 2000cc(a)(1)(A), (B). In

1 determining whether an asserted governmental interest is sufficiently compelling, the court
2 looks at the specific facts of the case, not general propositions. *Westchester*, 504 F.3d at
3 353. The City's principal reason for refusing to rezone the Catalina Street property was
4 that the property is considered a core property for maintaining the City's industrial base, as
5 evidenced in the City's General Plan. Pollart Decl., ¶ 20; Exhibit 7. The City may or may
6 not have a compelling interest in preserving *every* industrially zoned parcel for industrial
7 uses, but it certainly has a compelling interest in preserving some land for industrial use.
8 The Catalina Street site historically employed some 400 persons. Exhibit 28, Jermanis
9 Depo., p. 518, lns. 10-19. The evidence further shows that the Catalina Street property is
10 in fact uniquely important by reason of its location and current accommodations to the
11 preservation of a viable industrial base in the City. Exhibit 29, Sims Depo., p. 526, lns. 6-
12 28; pp. 529, ln. 18 to 530, ln. 10. Denial of the rezoning was also indisputably the only
13 practical – and therefore least restrictive – means of achieving the City's legitimate goal.
14 Approval of Church use with conditions would not preserve the property for industrial use.

15 III. *THE CITY'S REGULATIONS DO NOT VIOLATE THE "EQUAL TERMS"*
16 *PROVISIONS OF RLUIPA*

17 42 U.S.C. § 2000cc(b)(1), known as the "Equal Terms" provision of RLUIPA,
18 provides that "[n]o government shall impose or implement a land use regulation in a
19 manner that treats a religious assembly or institution on less than equal terms with a
20 nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

21 The Church's Second Cause of Action asserts that the City violated section
22 2000cc(b)(1) by: (1) allegedly failing to treat the Church the same as commercial
23 recreation and entertainment businesses; and (2) rejecting the Church's rezoning
24 application because its property was located within a 1/4 mile of businesses operating with
25 hazardous materials business plans. FAC ¶¶ 92-94. Neither claim has merit.

26 A. *Background Law.*

27 The Ninth Circuit has not yet addressed the Equal Terms provision of RLUIPA.
28 Lower courts in this circuit, however, have construed this provision as a codification of

1 “existing Supreme Court decisions under the Free Exercise and Establishment Clauses of
2 the First Amendment as well as under the Equal Protection Clause of the Fourteenth
3 Amendment.” *Ventura County Christian High School v. City of San Buenaventura*, 233
4 F.Supp.2d 1241, 1246 (C.D. Cal. 2002); *Guru Nanak Sikh Society of Yuba City v. County*
5 *of Sutter*, 326 F.Supp.2d 1140, 1155 (E.D. Cal. 2003); *Hale O Kaula Church v. Maui*
6 *Planning Com’n.*, 229 F.Supp.2d 1056, 1070-1071 (D. Hawaii 2002).

7 Therefore, “in evaluating plaintiffs’ claims under either [the equal terms provision
8 of] RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the Court must
9 first inquire as to whether defendants have treated plaintiffs in an unequal manner to
10 *similarly situated* entities.” *Ventura County*, 233 F.Supp.2d at 1247 (emphasis added); *see*
11 *also Vietnamese Buddhism Study Temple In America v. City of Garden Grove*, 460
12 F.Supp.2d 1165, 1173-1174 (C.D. Cal. 2006); *Guru Nanak*, 326 F.Supp.2d at 1155.

13 Other circuits are divided on application of the “similarly situated” standard to Equal
14 Terms claims. *See Lighthouse Institute*, 510 F.3d at 264-268; *Vision Church*, 468 F.3d 975,
15 1003; *Midrash Shephardi*, 366 F.3d 1214, 1230; *Prima Iglesia Bautista Hispana of Boca*
16 *Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006) [“similarly situated”
17 requirement applicable to “as applied” claims]. At a minimum, however, it is clear than
18 section 2000cc(b)(1), by its express terms, allows a claim based only on alleged differential
19 treatment of a “nonreligious assembly or institution.” *Midrash Sephardi*, 366 F.3d at 1230.

20 B. *Commercial Recreation and Entertainment Business are Not “Assemblies or*
21 *Institutions” Nor Are They Similar to Church Uses.*

22 The Church’s first Equal Terms claim is apparently based on the fact that the City’s
23 current Zoning Code allows “Commercial Recreation” and “Entertainment Activities” in
24 the IP and IL industrial zones with a CUP, whereas churches (and other Assembly Uses)
25 are permitted in these zones (also with a CUP) only in areas subject to the Assembly Uses
26 Overlay District. *See* RFJN, Exhibit 4, Zoning Code, Article 7, §§ 2-708.B.5, 2-708.B.9.

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1 This claim fails because Commercial Recreation and Entertainment Activities are
2 not similar to religious assemblies or institutions in any relevant respect, nor do they
3 qualify as “assemblies” or “institutions.”

4 “Assembly Uses” are defined in the City’s Zoning Code as “Meeting, recreational,
5 social facilities of a private or non-profit organization primarily for use by members or
6 guests, or facilities for religious worship and incidental religious education (but not
7 including schools as defined in this section). This classification includes union halls,
8 social clubs, fraternal organizations, and youth centers.” RFJN, Exhibit 2, 008.

9 “Entertainment Activities,” in contrast, are defined in the Zoning Code to include
10 specified types of recurring performing events, plus dancing and electronically displayed
11 events), but to *exclude* activities “for the non-profit, charitable or educational [purposes] of
12 public or private institutional uses.” RFJN, Exhibit 2, p. 010. While “Commercial
13 Recreation” is defined as “Provision of participant or spectator recreation or
14 entertainment,” and includes “amusement parks, bowling alleys, ice/roller skating rinks,
15 golf courses, miniature golf courses, and scale-model courses.” RFJN, Exhibit 2, p. 009.
16 These uses cannot reasonably be classified as “assemblies” or “institutions.”

17 The terms “assembly” and “institution” are not defined in RLUIPA. The Court
18 therefore must construe the terms “in accordance with [their] ‘ordinary, contemporary
19 common meaning.’” *San Jose Christian College*, 360 F.3d at 1034. While dictionary
20 definitions may be helpful, common usage is normally the best guide to legislative intent.
21 It cannot seriously be contended that Congress intend the terms “non-religious assembly”
22 and “institution” to be equated with common types of commercial for profit types of uses
23 (such as bars, nightclubs, sports stadiums, amusement parks, etc.) when this is so
24 obviously inconsistent with the common usage of these terms.

25 Turning to the dictionary, the term “assembly” is defined in Webster’s New
26 Universal Unabridged Dictionary as “a number of persons gathered together, usually for a
27 particular purpose, whether religious, political, educational, or social.” RFJN, Exhibit 32.
28 On its face, this definition conveys a group of persons voluntarily gathered for

1 associational purposes, not a group whose common denominator is that they paid the price
2 of admission. The dictionary definition can perhaps be literally stretched to any activity
3 involving an aggregation of persons for similar purposes. Such an interpretation proves
4 too much. Under this interpretation, shoppers gathered for a sales event, workers
5 assembled in a factory or an office to work, or bar patrons gathered for a drink could all be
6 described as an "assembly." There is nothing in RLUIPA or its legislative history,
7 however, which suggests that Congress intended such a far-reaching result, which would
8 essentially abolish all permissible distinctions between conventionally recognized (and
9 typically non-profit) assembly uses and common commercial activities involving
10 aggregations of people. Whatever ambiguity may adhere to the term "assembly," it cannot
11 seriously be argued that the term is commonly employed to refer to commercial
12 businesses, including those involving paid-for entertainment or recreational activity.

13 The term "institution" is assigned 8 different meanings in Webster's New Universal
14 Unabridged Dictionary. RFJN, Exhibit 33. It can literally, if euphemistically, be applied
15 to almost any human organization or even informal activities such as a weekly pick-up
16 basketball game in a local park. The primary meaning assigned by Webster's, however, is
17 "an organization, establishment, foundation, society, or the like, devoted to the promotion
18 of a particular object, esp. one of public, educational, or charitable character." RFJN,
19 Exhibit 33. This is a common sense usage and while it is true that the term "institution"
20 can be employed to refer to business enterprises of a venerable nature, *e.g.* a bank or other
21 financial "institution," the term is seldom employed to refer to ordinary commercial
22 enterprises such as skating rinks or movie theaters.

23 Since Entertainment Activities and Commercial Recreation as defined by the City
24 are not "assemblies" or "institutions" within the meaning of RLUIPA, the City believes it
25 is unnecessary to further consider whether these uses should be "similarly situated" with
26 Assembly Uses. In any event, while some assembly uses and some commercial
27 entertainment or recreation businesses may have *some* commonalities, there are also
28 typically substantial differences in intensity of use, hours of operation and resulting traffic,

1 impacts on neighboring uses and locational preferences, to say nothing of profit motive.
2 Given these factors and the longstanding historical distinctions between assembly and
3 institutional uses versus commercial uses generally, the City could clearly lawfully
4 determine that Assembly Uses as defined in the City's Zoning Code are not "similarly
5 situated" to commercial entertainment and recreational uses.

6 C. *Hazardous Waste Criteria.*

7 The Church's second Equal Terms claim is that the City has imposed a standard on
8 the Church's proposed Catalina Street church that has not been applied to any other
9 assembly use, *i.e.* a separation requirement preventing the church from be located within a
10 "¼ mile circumference" of any business operating under a hazardous materials business
11 plan. FAC ¶ 42. The short answer to this claim is that the City has not enacted any such
12 standard, let alone selectively applied it to the Church.

13 The apparent basis for this claim is the fact that the staff reports for the City Planning
14 Commission and City Council hearings on the Church's 2007 rezoning application
15 recommended denial of the application *in part* upon the presence of some eight businesses
16 with Hazardous Materials Business Plans ("HMBPs") *within 500 feet* of the Catalina Street
17 property, and a total of 13 such businesses within ¼ mile. Pollart Decl., ¶¶ 43-46; Exhibit
18 21, pp. 403-404. The record, however, does not indicate that the City Council actually
19 relied on this criteria in making the decision to reject the rezoning. Instead, the minutes,
20 hearing transcript and the staff reports themselves make it clear that the primary ground for
21 denial of the rezoning was the fact that the Catalina Street property did not satisfy two of the
22 criteria used to select all other properties in the Assembly Use Overlay zone, *i.e.* the
23 property was more than ¼ mile from a designated arterial street, and in a "focus area"
24 reserved by the General Plan for industrial and commercial development. Pollart Decl., ¶¶
25 41, 45; Exhibits 22, 24, 35.

26 The Church's Equal Terms claim here fails for three reasons. First, the "Equal
27 Terms provision of RLUIPA by its terms provides that governments shall not "impose or
28 implement a *land use regulation in a manner that treats a religious assembly or institution*

1 on less than equal terms with a nonreligious assembly or institution.” 42 U.S.C. §
2 2000cc(b)(1), emphasis added. Contrary to the Church’s implication, the City has not
3 adopted – much less “imposed” on the Church any regulation requiring a “1/4
4 circumference” (or any other specific separation) between assembly uses and sites with
5 HMBPs. No such regulation or standard appears in the City’s General Plan, zoning code,
6 assembly use overlay criteria, or any other city regulation. Pollart Decl., ¶ 46.

7 What the Church is apparently objecting to is the consideration of the proximity of
8 hazardous wastes as a public health and safety issue affecting the Catalina Street property.
9 The statute, however, is addressed at discriminatory application of actual regulations. There
10 appears nothing in the statute or commonly accepted principles of law that would allow the
11 Court to hold municipalities liable for merely *considering* new information on a zone change
12 application.

13 Even were one to assume that consideration of new criteria were actionable under
14 RLUIPA, there remains the issue of causation. Clearly a plaintiff cannot claim relief under
15 RLUIPA if it has suffered no actual harm from the agency’s alleged errant analysis. At a
16 minimum then, the Church must show that consideration of the HMBP was actually
17 responsible for the denial of its rezoning application. The evidence simply does not support
18 any such argument. While the subject of HMBPs was indeed considered by City staff and
19 the City Planning Commission, the record does not show that the final City Council
20 decision was actually affected by this consideration. Representatives of the Church testified
21 extensively, and apparently persuasively, that the mere possession of HMBPs by nearby
22 businesses was not in and of itself sufficient to justify denial of the rezoning application.
23 Exhibit 35. The City Council apparently agreed. No mention of the issue was made by any
24 Councilmember voting on the rezoning. Exhibit 35. The record further affirmatively
25 indicates that the primary ground for rejection of the rezoning at all stages of consideration
26 was the fact that the Catalina Street property did not meet two of the eight specific criteria
27 utilized in selecting all other properties in the Assembly Use Overlay zone. Pollart Decl., ¶
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1 44; Exhibit 23, p. 447. The failure of this parcel to satisfy the 8 established criteria (which
2 all of the 196 parcels satisfied) was the basis for denying the rezoning application.

3 A final problem with the Church's HBMP argument is that there is no evidence that
4 the City has applied different criteria to similarly situated applicants, of either a religious
5 or non-religious nature. *See Prima Iglesia*, 450 F.3d at 1311 [plaintiff in as applied Equal
6 Terms must show differential application to *similarly situated* parties]. To sustain its
7 HBMP claim, the Church would have to show that the City intentionally ignored the
8 presence of HBMPs in the context of another similar *rezoning* application. *Id.* at 1311-
9 1313 [no Equal Terms claim where plaintiff sought "markedly different forms of zoning
10 relief."]. The Church cannot do this. No other applicant has ever requested rezoning of
11 industrial land to accommodate an assembly use. Pollart Decl., ¶ 44. There is also no
12 basis for suspecting actual discrimination. Faced with the prospect of a massive assembly
13 use in an industrial zone, the City prudently considered public safety issues posed by the
14 close proximity of hazardous materials.

15 IV. *THE CITY'S REGULATIONS DO NOT TOTALLY EXCLUDE OR*
16 *UNREASONABLY RESTRICT RELIGIOUS ASSEMBLIES IN SAN LEANDRO*

17 The Church's Third Cause of Action is based on 42 USC § 2000cc(b)(3), which
18 prohibits state or local land use regulations which either totally exclude religious
19 assemblies from a jurisdiction, or unreasonably limit such uses. There is little case law
20 construing this provision of RLUIPA. However, it is clear that the City's regulations do
21 not totally exclude religious uses from the City.

22 Aside from the 45 existing religious uses, including the Church's own existing
23 campus, the City regulations allow churches with a CUP in all residential zones, and also
24 on the 196 sites in other commercial and industrial zones in the Assembly Use Overlay.
25 *See Zola Decl.*; Exhibit 34. *Vision Church*, 468 F.3d at 990 [no "total exclusion" where
26 churches allowed with special permit in residential zones]. The same evidence on its face
27 precludes any claim that the City's regulations "unreasonably restrict" such uses. With 45
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1 existing churches in the City there is no evidence of any unmet demand for Church space
2 in the City. Pollart Decl., ¶ 5.

3 V. *THE CHURCH'S CONSTITUTIONAL CLAIMS PRESENT NO TRIABLE ISSUE*

4 The Church's Fourth through Ninth Causes of Action present various constitutional
5 claims under 42 U.S.C. § 1983. If the Church cannot sustain a claim under RLUIPA, its
6 claims must also fail under the standards governing its Free Exercise, Free Speech and
7 other constitutional claims.

8 A. *The City Has Not Unconstitutionally Interfered with the Church's First*
9 *Amendment Right to the Free Exercise of Religion.*

10 Plaintiff's Fourth Cause of Action seeks relief under the Free Exercise Clause of the
11 First Amendment. FAC ¶¶ 103-104. The claim is based on the same facts as the Church's
12 RLUIPA "substantial burden" claim, and fails for essentially the same reasons. In
13 addition, the constitutional claims suffers from another threshold problem. Federal courts
14 have not recognized a First Amendment right to practice religion *on any particular parcel*
15 *of land*, absent a showing that the proposed site itself possesses some special religious
16 significance. *Lighthouse Institute for Evangelism*, 510 F.3d at 273-274; *Grace United*
17 *Methodist*, 451 F.3d at 654-655; *Messiah Baptist Church*, 859 F.2d at 824-825; *Lakewood*,
18 *Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*, 699 F.2d 303,
19 306-307 (6th Cir. 1983). Although the Church's claims are premised on the City's refusal
20 to rezone its Catalina Street property for church use, the Church does not claim this
21 property has any intrinsic religious significance. There is no claim that the City has taken
22 any actions to interfere with religious activities at the Church's current operations at 577
23 Manor Boulevard.

24 Even were the Church's Free Exercise rights deemed implicated by the denial of the
25 Catalina Street rezoning, the Church cannot show that the City's actions inflicted a
26 substantial burden for reasons stated in Section II above. In addition, courts evaluating Free
27 Exercise claims in the zoning context generally apply only a rational basis test. Under the
28 rational basis test, so long as the challenged zoning actions are of general application and

1 neutral towards religious activity itself, they need not be narrowly tailored nor justified by a
2 compelling governmental interest, regardless of any incidental restrictions they may impose
3 on religious activities. *San Jose Christian College*, 360 F.3d at 1030-1031; *Lighthouse*
4 *Institute for Evangelism*, 510 F.3d at 277; *Grace United Methodist*, 451 F.3d at 649; *Vision*
5 *Church*, 468 F.3d at 1001. The First Amended Complaint does not allege any facts
6 suggesting that the City zoning regulations affecting the Church or churches generally are
7 targeted at religious activity. The Church also has not made any such claim in discovery.
8 The City's regulations are clearly neutral on their face. The evidence shows that the City's
9 actions were based on legitimate public policy considerations, *i.e.* the need to preserve the
10 City's industrial base. Pollart Decl., ¶ 20; Exhibit 13. Nothing more is required to survive
11 scrutiny under the Free Exercise clause. *See, e.g., Lighthouse Institute for Evangelism*, 510
12 F.3d at 273-277 [upholding exclusion of churches from redevelopment zone]; *C.L.U.B.*, 342
13 F.3d 752, 763-764; *Messiah Baptist Church*, 859 F.2d at 823-826.

14 B. *The City Has Not Interfered with the Church's Freedom of Speech.*

15 The Church's Fifth Cause of Action alleges that the City has violated the Church's
16 First Amendment right to free speech by discriminating against the Church "by restricting
17 its speech rights and the congregants' corresponding right to hear." FAC ¶ 106. The
18 complaint further alleges that these restrictions result from the "crowded facilities,
19 inadequate parking, and traffic congestion at the CHURCH's present location," which
20 alleged hinder or deter Church members from entering the current facilities to exercise their
21 rights. *Id.* Plaintiff does not allege, however, that the City has taken any affirmative actions
22 to hinder or suppress any speech activities undertaken at their current church site. Neither
23 does the Church claim, nor could it, that any of the City actions challenged in this case were
24 motivated by a desire to suppress religious (or other) speech activity. The Church's claim
25 thus boils down to the proposition that City has denied free speech by precluding the
26 Church and its members from expanding by relocating to the Catalina Street property.

27 In these circumstances, zoning regulations will be upheld against a free speech
28 challenge notwithstanding any incidental effects on speech activity so long as they meet

1 the common First Amendment test for time, place and manner regulations. *San Jose*
2 *Christian College*, 360 F.3d at 1032, citing *City of Renton*, 475 U.S. 41; *Grace United*, 451
3 F.3d at 657. Under this test, zoning regulations must be upheld so long as they are
4 “designed to serve a substantial governmental interest,” “do not unreasonably limit
5 alternative avenues of communication,” and are “narrowly tailored” in the sense that they
6 are directed only at the particular class of activities or land uses reasonably believed to
7 generate the type of impacts regulated by the ordinances. *City of Renton*, 475 U.S. at 47
8 and 52; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989).

9 The City’s zoning regulations are clearly content neutral with respect to religious
10 speech and expression. They do not provide for granting or withholding permits on the
11 basis of the applicant’s speech or viewpoint, religious or otherwise. Where a zoning
12 regulation serves legitimate purposes unrelated to the regulation of speech, it is deemed
13 content neutral even if it has some incidental effects on speech activities. *San Jose*
14 *Christian College*, 360 F.3d at 1033; *City of Renton*, 475 U.S. at 48-49.

15 It is beyond serious dispute that zoning regulations generally advance substantial
16 governmental interests. *City of Renton*, 475 U.S. at 50 [“a city’s interest in attempting to
17 preserve the quality of urban life is one that must be accorded high respect.”]; *Grace*
18 *United*, 451 F.3d at 657. Municipalities have a legitimate interest in regulating the
19 location of assembly uses, including churches, so as to avoid or minimize conflicts with
20 other uses. *Vision Church*, 468 F.3d at 1000.

21 The regulations, however, need not be the least restrictive means available for
22 addressing potential problems. *Ward*, 491 U.S. at 797-798. The “narrow tailoring”
23 requirement is satisfied “so long as the regulation promotes a substantial governmental
24 interest that would be achieved less effectively absent the regulation.” *Id.* at 799. Here,
25 the City’s regulations allow Assembly Uses in all residential zones, and prohibit them in
26 commercial and industrial zones only where necessary to further specific goals and
27 policies reflected in the criteria utilized in establishing the Assembly Use Overlay zone.
28 Pollart Decl., ¶ 7; Exhibit 3. Nothing more is required to satisfy the narrow tailoring

1 requirement. *See Members of City Council of City of Los Angeles v. Taxpayers for*
2 *Vincent*, 466 U.S. 789, 808, 104 S.Ct. 2118 (1984) [upholding total ban on private signs on
3 public rights-of-way on grounds that “By banning these signs, the City did no more than
4 eliminate the exact source of the evil it sought to remedy.”].

5 Zoning regulations also may not “unreasonably limit alternative avenues of
6 communication,” meaning that they may not unreasonably restrict the total amount of land
7 available for expressive uses. *City of Renton*, 475 U.S. at 53-54. As discussed previously,
8 Assembly Uses are allowed in over half the total area of the City, and many, many more
9 properties than the apparent demand for religious uses requires. Pollart Decl., ¶ 12;
10 Exhibit 9. The City is not required to guarantee that all of these sites are currently
11 available for sale and development or conversion for churches or other First Amendment
12 uses. *City of Renton*, 475 U.S. at 53-54 [“That respondents must fend for themselves in the
13 real estate market, on an equal footing with other prospective purchasers and lessees, does
14 not give rise to a First Amendment violation.”]; *Topanga Press*, 989 F.2d 1524, 1536.

15 C. *The City Has Not Interfered with The Church’s or Its Members Freedom to*
16 *Assemble or Freedom of Association.*

17 The Church’s Sixth and Seventh Causes of Action allege in conclusory fashion that
18 the City has deprived the Church of its “right to freely assemble” and “right to freely
19 associate” for the “purposes of religious worship and expression.” FAC ¶¶ 109, 112.
20 Again, the Church does not allege that the City has taken any actions to interfere with or
21 deter participation in activities at the Church’s current Manor location. These claims
22 therefore fail for much the same reasons as the Church’s Free Exercise and Free Speech
23 claims. *See San Jose Christian College*, 360 F.3d at 1033; *Grace Church*, 451 F.3d at 658;
24 *C.L.U.B.*, 342 F.3d 752, 765; *Lighthouse Institute*, 406 F.Supp.2d 507, 521-522. While the
25 City has declined to approve a proposed new Assembly Use on the vacant Catalina Street
26 property, this does not violate the Constitution.

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1 D. *The City Has Not Denied the Church Equal Protection of the Law.*

2 The Church's Eighth Cause of Action asserts a denial of the Church's right to Equal
3 Protection. The claim incorporates and is presumably based on the same allegations as the
4 Church's Equal Terms claim under RLUIPA. FAC ¶¶ 114-115.

5 Absent allegations of such invidious intentional discrimination – and none are
6 presented – the Church's Equal Protection claim is reviewed under the rational basis test.
7 *C.L.U.B.*, 342 F.3d at 766; *Congregation Kol Ami v. Abington Township*, 309 F.3d 120,
8 133 (3rd Cir. 2002). To sustain the claim, the Church must show (1) that it has been
9 treated differently (and less favorably) than other *similarly situated* individuals or entities;
10 and (2) that the dissimilar treatment is irrational, *i.e.* bears no reasonable relationship to a
11 legitimate governmental purpose. *Christian Gospel Church, Inc. v. City and County of*
12 *San Francisco*, 896 F.2d 1221, 1225-1226 (9th Cir. 1990), *cert den.* 498 U.S. 999 (1990);
13 *Congregation Kol Ami*, 309 F.3d at 133-134, 136-137.

14 In light of the previous discussion of the Church's Equal Terms claim, the Church's
15 Equal Protection claims also fail on this basis. The City may rationally distinguish
16 between religious and other assembly uses on the one hand, and commercial recreational
17 and entertainment uses on the other. *See* section III, *supra*. Although the Church
18 complains that the proximity of businesses with HMBPs was not considered in the initial
19 site selection process for the Assembly Use Overlay zone, the Church cannot show any of
20 the following; (1) that its rezoning application was actually rejected on this ground, as
21 opposed to other legitimate grounds; (2) that the City has or will fail to consider HMBPs in
22 other cases involving site-specific applications for Assembly Uses; (3) that consideration
23 of HMBPs was arbitrary and failed to serve any legitimate public purpose.

24 E. *The City Did Not Violate the Church's Right to Due Process.*

25 The Church's Ninth and final Cause of Action alleges that the City denied the
26 Church due process of law by (1) denying the Church the use of the Catalina Street property
27 based on vague and indefinite General Plan, zoning and other criteria; and (2) "intentionally
28 prolonging the Assembly Use Permit application process in order to obstruct, delay and

1 prevent the CHURCH's use of the CATALINA property." FAC ¶ 118. Neither of these
2 claims asserts a legally colorable due process claim, nor is supported by fact.

3 To state any kind of due process claim, the plaintiff must allege the deprivation of
4 some legally protected interest in life, liberty or property. *Board of Regents of State*
5 *Colleges v. Roth*, 408 U.S. 564, 570-572, 92 S.Ct. 2701 (1972); *Wedges/Ledges of*
6 *California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994); *Prater v City of*
7 *Burnside, Ky.*, 289 F.3d 417, 431-432 (6th Cir. 2002). The extent of legally protected
8 property rights is generally defined by "existing rules or understandings that stem from an
9 independent source such as state law." *Roth*, 408 U.S. at 577. The Church does not have a
10 protected property or liberty interest in constructing religious assembly facilities on the
11 Catalina Street property. This use of the property has never been legally authorized or
12 actually occurred. *Wedges/Ledges*, 24 F.3d at 62.

13 The Church here cannot claim a deprivation of property under either a vested rights
14 or entitlement theory. It is undisputed that the Church's Catalina Street property has never
15 been zoned to allow assembly uses, either with or without a CUP. Although the Church
16 applied for rezoning of the property, rezoning is under California law a purely legislative
17 act. *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 516, 169 Cal.Rptr. 904
18 (1980). Legislative decisions are in turn generally constrained by no substantive criteria at
19 all beyond the minimum constitutional requirement that such actions be rationally related
20 to legitimate governmental interests. *Id.* The Church therefore clearly has no protected
21 property interest in its applications to rezone the Catalina Street property.

22 While the Church might also conceivably claim a liberty interest in its right to
23 conduct religious activities, any claim based on this theory must also fail. There is no
24 recognized liberty interest in building a church on property that has never been devoted to
25 such use and has never been zoned for it.

26 1. *The Vagueness Claim.*

27 The Church's vagueness claim necessarily fails for lack of a protected liberty
28 property interest. Moreover, the reach of a due process challenge based on the vagueness

1 doctrine is inapplicable here. The concerns implicated by overly vague laws are (1) that
2 they fail to give persons "of ordinary intelligence" fair notice of what the law requires and
3 to conform their conduct accordingly, and (2) they invite arbitrary, subjective and
4 inconsistent enforcement by failing to establish ascertainable standards. *Village of Hoffman*
5 *Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186 (1982); *Konikov v.*
6 *Orange County, Fla.*, 410 F.3d 1317, 1329-1331 (11th Cir. 2005). A void-for-vagueness
7 challenge, however, necessarily contemplates a statute or ordinance that directly regulates
8 conduct, and whose violation gives rise to potential loss of life, liberty or property, *i.e.*
9 criminal or civil prosecution. The due process clause does not restrict the factors that a
10 governmental agency may consider when deciding whether or not *to adopt or amend* an
11 existing regulation, as opposed to apply it to particular conduct.

12 2. *The Claim for Unreasonable Delay.*

13 The Church's claim for undue delay also fails for lack of a protected liberty or
14 property interest. There is no constitutional provision that requires a City to meet time
15 limits when considering zoning or rezoning measures. The record further does not establish
16 any arbitrary or unreasonable delay. Pollart Decl., ¶¶ 15, 18, 20, 24. The City was
17 confronted with a major policy issue by the Church's initial application. It nevertheless
18 moved forth deliberately and completed a major amendment to its existing zoning scheme
19 within one year, and acted upon the Church's subsequent rezoning application in little more
20 time than necessary to process the application, prepared staff reports and notice public
21 hearings. Pollart Decl., ¶ 20, 24-35. There is no basis for a claim of unreasonable delay.

22 VI. *CONCLUSION*

23 In light of the foregoing, City respectfully requests this Honorable Court grant its
24 motion for summary judgment.

25 Dated: August 27, 2008

MEYERS, NAVE, RIBACK, SILVER & WILSON

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By _____ /s/

DEBORAH J. FOX
Attorneys for Defendant
CITY OF SAN LEANDRO